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In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989), which mandates timber sales from particular federal lands, establishes interim guidelines for these sales, and establishes an exclusive judicial remedy for contesting the lawfulness of the mandated timber sales:

(1) Moots portions of respondents' claims in pending federal district court actions which seek declaratory and injunctive relief on planned timber sales; and,

(2) Violates the constitutional principle of separation of powers as applied to the adjudication of these claims.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents Pilchuck Audubon Society, Washington Environmental Council, Washington Native Plant Society, Portland Audubon Society, Lane County Audubon Society, Oregon Natural Resources Council, and Siuslaw Task Force were plaintiffs in the district court (W.D. Wash.) and appellants in the court of appeals. National Audubon Society was a plaintiff in the district court (W.D. Wash.) and was not a party to the appeal. Respondents Washington Contract Loggers Association and William Pickell were plaintiffs in the district court (W.D. Wash.) and appellees in the court of appeals.

Respondents Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Salem Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council were plaintiffs in the district court (D. Or.) and appellants in the court of appeals.

Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O & C Counties and Benton County were defendants-intervenors in the district court (D. Or.) and appellees in the court of appeals.

None of the parties has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc., which is an affiliate of Sun Studs, Inc., and Scott Timber Co., which is an affiliate of Roseburg Forest Products Co.

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General on behalf of petitioners F. Dale Robertson and Manuel Lujan, Jr.

OPINIONS BELOW

The amended opinion of the court of appeals is reported as *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). The opinion and order of the district court in *Seattle Audubon Soc'y v. Robertson*, No. 89-160WD (W.D. Wash.), is unreported and is set out in Appendices C and D to the Petition for a Writ of Certiorari at 20a-28a and 29a-34a. The opinion of the district court in *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR (D. Or.), is unreported and is set out in Appendix E to the Petition for a Writ of Certiorari, 35a-42a.

JURISDICTION

Jurisdiction of the Court exists under 28 U.S.C. § 1254(1) (1991).

STATUTORY PROVISIONS INVOLVED

Section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989) (hereafter "section 318"), is reproduced in its entirety in Appendix F to the Petition for a Writ of Certiorari, 43a-55a.

STATEMENT OF THE CASE

Respondent NFRC adopts the Statement of the Case set forth in petitioners' Brief.

Respondent NFRC supplements the Statement of the Case as follows:

A. Background to the proceedings below.

1. The timber economy of the Pacific Northwest.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. For nearly a century these regions have been a primary source of timber supply for the country.

The national forests of the Pacific Northwest supply about half of the timber sold by the Forest Service.[1] Until this litigation intervened, the 23 national forests in Washington, Oregon and northern California supplied approximately five billion board feet[2] of timber each year in the 1980s.[3]

In western Oregon the Department of Interior, Bureau of Land Management ("BLM") operates a separate timber sale program under the Oregon and California Lands Act

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[1] Forest Service, United States Dep't of Agriculture, *The Forest Service Program for Forest and Rangeland Resources: A Long-Term Strategic Plan*, 6-16 (1990).

[2] A board foot is a one foot by one foot by one inch volume of wood.

[3] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990*, Table 15 (1990) ("*Production, Prices*").

("OCLA"), 43 U.S.C. §§ 1181, *et seq.* This sale program contributes an additional one billion board feet of timber each year.[4]

Forest Service and BLM timber sales generate substantial revenues for the federal treasury. Forest Service 1990 timber sales for Oregon and Washington alone generated over $400 million in proceeds.[5]

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[6] Much of this employment is dependent upon federal timber sales, which provide one-third of timber harvested in the Pacific Northwest.[7] A large component of the forest products industry in the region depends largely or completely on purchases of federal timber to operate their mills. Many of these federally-dependent mills are small, independent, family-owned businesses which have provided the main source of employment in their communities for decades.[8]

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[4] *Id.*, Table 15.

[5] Forest Service, United States Dep't of Agriculture, *Timber Sale Program Information Reporting System, Regional Summary, Fiscal Year 1989*, Appendix B at 3 (1990).

[6] *Id.*, Table 20.

[7] *Production, Prices, supra*, Table 74.

[8] Congress recognized the reliance of small mills on federal timber supply by establishing a "small business set-aside" program administered by the Small Business Administration. This program guarantees that certain proportions of federal timber may be (continued...)

Thirteen of the most productive national forests in Washington and Oregon are located west of the Cascade Mountains and are forested with old-growth and second-growth Douglas fir trees. These forests, and the woodlands in the six administrative districts of the BLM in western Oregon, provide habitat for northern spotted owls.

Concern has developed over the past fifteen years about the sufficiency of this habitat to support a viable population of northern spotted owls. In June, 1990, the United States Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* 55 Fed. Reg. 26,114 (1990).

Beginning in the mid-1970s and continuing to the present, biologists from government agencies, universities and private groups developed and refined guidelines for managing spotted owl habitat. These standards have been refined as more information about the bird became known.

Unfortunately, no consensus about the content of these guidelines evolved among government officials, timber industry representatives and environmentalists. The main issues remaining in dispute are the total amount of land

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8 (...continued)
purchased by small businesses, thus assuring a steady supply of timber for these small companies. *See Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied sub nom., Duke City Lumber Co. v. Knebel*, 429 U.S. 1039 (1977).

needed for spotted owl habitat and the necessary parcel size and distribution of lands reserved for this purpose.

2. *Forest Service plans for spotted owl protection.*

The National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, directs the Forest Service to promulgate land and resource management plans (forest plans) for each unit of the National Forest System. The statute requires that these plans provide for multiple uses of the national forests and coordinate outdoor recreation, range, timber, watershed, wildlife and fish and wilderness uses. 16 U.S.C. § 1604(e)(1). In the Pacific Northwest, the development of these plans has been delayed by controversy and litigation.

Each region of the Forest Service has developed a regional guide to address regional forest planning issues and provide direction on the content of individual forest plans. *See* 36 C.F.R. § 219.8. The regional guides may also function as forest plans prior to the development and approval of individual forest plans.

In May, 1984, the Forest Service Chief approved the Pacific Northwest Regional Guide and accompanying Final Environmental Impact Statement. The Guide included planning standards for northern spotted owl habitat. The approval, however, was reversed following an administrative appeal. The agency then began preparation of a supplement

to address spotted owl habitat concerns. SAS Ex. Rec. 1, p. 9.[9]

A Supplement to the Environmental Impact Statement for the Pacific Northwest Regional Guide was prepared during 1985 to 1988. A draft Supplement, issued in 1986, analyzed 12 alternatives in detail, ranging from designating no spotted owl habitat areas ("SOHAs") to designating all remaining spotted owl habitat as protected. The Final Supplement, published in July, 1988, narrowed these alternatives to seven. *Id.* at 10.

On December 8, 1988, Petitioner Robertson amended the Pacific Northwest Regional Guide to generally reflect the spotted owl habitat guidelines outlined in Alternative F of the Final Supplement. These standards were applied to the 13 Washington and Oregon national forests with spotted owl habitat. *Id.* at 10; Ex. A.

The amended Regional Guide required the preservation of at least 300 acres of habitat immediately around each spotted owl nest site. From 1,000 to 3,000 total acres, varying by geographic area, were to be preserved near each nest site.

The amended Regional Guide contemplates the preservation of up to 858 spotted owl habitat areas on those

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[9] "SAS Ex. Rec." as used herein refers to the Appellants' Excerpts of Record in the appeal of *Seattle Audubon Society v. Robertson* to the court of appeals. "PAS Ex. Rec." refers to Appellants' Excerpts of Record in the *Portland Audubon Society v. Lujan* appeal.

portions of these national forests which are suitable for timber production and 272 habitat areas in wilderness areas. It contains additional standards on the clustering of SOHAs and the location of habitat areas and sets out a research and development program for information on the northern spotted owl.

Petitioner Robertson directed that the amended Regional Guide would provide interim forest management guidelines pending completion of the forest plans still in preparation.

The adoption of this spotted owl protection plan occurred through a Record of Decision dated December 8, 1988. SAS Ex. Rec. 1, Ex. A. This decision was challenged as violating various federal laws in the *Seattle Audubon Soc'y v. Robertson* case below.

3. Bureau of Land Management spotted owl protection.

Less detailed guidelines governed the management of forests in the six western Oregon districts of the BLM. Between 1979 and 1983, the BLM adopted Timber Management Plans for each of these districts. The Timber Management Plans were based on an environmental impact statement for each district. These Timber Management Plans contained guidelines for wildlife protection and timber management. PAS Ex. Rec. 9.

On February 3, 1987, the BLM Oregon State Director issued a Spotted Owl Environmental Assessment. This document reviewed new information concerning the habitat of the northern spotted owl to determine if a supplement was required to the recently completed environmental impact statements. PAS Ex. Rec. 11.

Based on this analysis, and because new resource management plans were then scheduled to be completed by 1990,[10] the BLM Oregon State Director issued an April 10, 1987 Decision Notice declining to supplement the environmental impact statements for the western Oregon districts. PAS Ex. Rec. 11.

The timber sales authorized by the BLM Timber Management Plans and a March, 1983 Forest Resource Policy Statement were claimed to violate federal law in the *Portland Audubon Soc'y v. Lujan* case below. PAS Ex. Rec. 15-16.

B. Initiation of the proceedings below.

1. Seattle Audubon Society v. Robertson.

On February 8, 1989, respondents Seattle Audubon Society, *et al.*, filed an action against petitioner Robertson as Chief of the United States Forest Service. The complaint sought declaratory and injunctive relief concerning Petitioner Robertson's December 8, 1988 decision to amend the Pacific Northwest Regional Guide and provide the spotted owl protection stated in Alternative F of the Final Supplement to the Environmental Impact Statement.

Three claims for relief were asserted. *See*, SAS Ex. Rec. 1, pp. 19-20. The first claim was that the administrative action "does not assure that a viable population of northern spotted owls will be maintained in the Pacific Northwest, in

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[10] The new plans are now expected to be completed in 1992.

violation of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604(g)(3)(B) . . . ." That statute sets out seven criteria for the content of forest plans. The criterion claimed to be violated requires these plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specified land area in order to meet overall multiple-use objectives . . . ."

The second claim for relief alleged that the planned actions would violate the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703, *et seq.* That statute makes criminal certain takings, killings, and other conduct related to protected migratory birds, unless permitted by action of the Secretary of the Interior.

The final claim asserted that the Final Supplement to the Environmental Impact Statement violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, because its environmental analysis was faulty. The necessary content of environmental impact statements is governed by 42 U.S.C. § 4332(2)(C).

Respondents[11] sought injunctive relief enjoining the award of any timber sale contract in the 13 national forests at issue which would log more than 40 acres of spotted owl habitat.

In the spring of 1989, the district court granted preliminary relief to respondents and enjoined 163 planned timber

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[11] When using the term "respondents" in this brief, respondent NFRC refers to the plaintiff environmental groups in the cases below.

sales in Washington and Oregon. These sales involved sites containing more than 40 acres of old-growth timber.

2. ***Portland Audubon Society v. Lujan.***

Similar litigation had been filed earlier in Portland. In October, 1987, respondents sued petitioner Lujan's predecessor, as Secretary of the Interior, in the United States District Court for the District of Oregon. The complaint sought declaratory and injunctive relief, seeking to enjoin 15 planned timber sales and any future sales within 2.1 miles of a known spotted owl habitat.

Four claims were asserted to justify this relief. *See*, PAS Ex. Rec. 15-16. Respondents first contended that petitioner Lujan's plans to continue timber harvesting violated NEPA, *supra*, because of the failure to supplement previously issued environmental impact statements.

Respondents next claimed that petitioner Lujan's 1983 Forest Resources Policy Statement, which sets timber management standards for BLM lands subject to the OCLA, 43 U.S.C. §§ 1181, *et seq.*, violated section 1 of that act, 43 U.S.C. § 1181a. That legislation requires the Department of Interior to manage federal lands, largely reacquired from the Oregon and California Railroad:

> . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal *[sic]* of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the eco-

> nomic stability of local communities and industries, and providing recreational facilities *[sic]* . . . .

43 U.S.C. § 1181a.

The third claim asserted that the 1983 policy statement was inconsistent with multiple-use policies in the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701, *et seq.* That act sets general policies for the management of all federally-owned public lands. It requires consideration of a variety of goals in making federal land management decisions. The Act states that it is subordinate to other more specific statutes on the administration of public lands. *See* 43 U.S.C. § 1701(b).

Finally, respondents charged that the BLM timber harvesting program violated the MBTA, *supra*, because such activities would kill spotted owls. As noted earlier, that statute proscribes certain conduct affecting migratory birds unless allowed by a permit from the Secretary of the Interior.[12]

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[12] Respondents' NEPA claim was later mooted by the enactment of section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-102, 101 Stat. 1329 (1987). The district court initially dismissed all of respondents' claims as mooted by this statute. This action was reversed by the court of appeals. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3229 (1989). On remand, the district court again dismissed the claims. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456 (D. Or. 1989). In September, 1989, the court of appeals affirmed the dismissal of the (continued...)

Preliminary relief was obtained in these cases. The injunction against Forest Service logging during 1989 in *Seattle Audubon Society*, and the injunctions limiting BLM timber sales by the court of appeals in *Portland Audubon Society*, shut down a significant part of the Northwest timber industry. Fears of widespread unemployment and business losses, coupled with concerns for the preservation of the northern spotted owl, spurred Congress in 1989 to adopt temporary legislation on logging and spotted owl habitat preservation on federal forest lands in Washington and Oregon.

C. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990.

Congress adopted section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 745 (1989), in order to "balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989). To accomplish these ends, the legislation "sets terms and conditions applicable only for fiscal year 1990 for making timber sales on Federal lands in Oregon and Washington, for managing habitat of northern spotted owls, and for

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12 (...continued)
NEPA claim, but reversed the dismissal of the other claims and remanded the case for further proceedings. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1470 (1990).

minimizing fragmentation of significant old growth forest stands." *Id.* In particular, the statute directs the following:

1. Aggregate timber sales levels/logging some spotted owl habitat.

Section 318(a)(1), 103 Stat. 745, requires the Forest Service to offer 7,700,000,000 board feet of timber for sale from national forests in Oregon and Washington in the two-year period of fiscal years 1989-90. Of this amount, 5,800,000,000 board feet was required to be offered from the "thirteen national forests in Oregon and Washington known to contain northern spotted owls . . . ." The BLM was required to offer 1,900,000,000 board feet in timber sales from its western Oregon districts in the same two-year period.

2. Increased spotted owl habitat protection.

Various parts of the legislation prescribe how logging activity will occur and what protection is to be afforded Spotted Owl Habitat Areas. These include:

a. Minimizing fragmentation of old growth stands.

Sections 318(b)(1) and (b)(2), 745 Stat. 745-46, require timber sales from the national forests known to contain northern spotted owls to "minimize fragmentation of the most ecologically significant old growth forest stands." To the extent fragmentation is required to meet the target sales level, areas with habitat for nesting pairs of spotted owls should be maintained, if not already included in a SOHA.

b. Expanded definition of spotted owl habitat areas.

Section 318(b)(3), 103 Stat. 746, expands the acreage of protected spotted owl habitats beyond that prescribed in the 1988 amended Regional Guide. The following chart shows the regional guide acreage requirements, the new acreage required by section 318(b)(3), the number of SOHAs in each area, and the additional SOHA acreage mandated by section 318(b)(3):[13]

Area	*Regional Guide Habitat (acres)*	*Section 318 Habitat (acres)*	*Affected SOHAs*	*Additional Acres Mandated by § 318(b)(3)*
Olympic Peninsula	3,000	3,200	34	6,800
Washington Cascades	2,200	2,600	208	83,200
Oregon Coast Range	2,000	2,500	41	12,300
Oregon Cascades	1,500	1,875	478	179,250

[13] The data on Regional Guide habitat acreage and estimated spotted owl habitat areas is taken from the Forest Service, United States Dep't of Agriculture, *Amendment Number 1 to the Regional Guide for the Pacific Northwest Region, May, 1984*, Tables 1, 9 (Dec. 1988).

Klamath	1,000	1,250	97	24,250
TOTAL:				305,800

c. Other protection.

Under section 318(b)(3) all other standards and guidelines for protection of spotted owl habitat in the December 8, 1988 Record of Decision are preserved. The Forest Service is also required to give lower priority to logging areas proximate to a SOHA. Section 318(b)(4), 103 Stat. 746.

Section 318(b)(5), 103 Stat. 746-47, prohibits timber sales within the 110 spotted owl habitat areas already protected under an agreement between the BLM and the Oregon Department of Fish and Wildlife. It supplements this protection by prohibiting logging in an additional 12 spotted owl habitat areas to be selected by BLM and other agencies.

3. Limitations on remedies.

The legislation limits and defines the exclusive remedies available to determine issues arising under the measure. Section 318(b)(6)(A), 103 Stat. 747, states that, "The guidelines adopted by subsections (b)(3) and (b)(5) of this section [the spotted owl habitat requirements] shall not be subject to judicial review by any court of the United States."

Any judicial challenge to a timber sale must be filed in federal district court within 15 days of the initial adver-

tisement for bids on the sale. Section 318(g)(1), 103 Stat. 749-50. Should such litigation be filed, the agency must not take action to award the sale for 45 days. In exchange, preliminary relief by a court is proscribed by section 318(g)(1) which provides that:

> No restraining order or preliminary injunction shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a timber sale or timber sales in fiscal year 1990 from the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls.

Section 318(g)(1).[14]

The subsection expedites judicial review of the challenged timber sale, requiring a "final decision relative to any challenge within forty-five days from the date such challenge is brought, unless the court determines that a longer period

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[14] Permanent injunctive relief could be obtained. Section 318(g)(1) provides that:

> . . . the courts shall have authority to enjoin permanently, order modification of, or void an individual sale if it has been determined by a trial on the merits that the decision to prepare, advertise, offer, award, or operate such sale is arbitrary, capricious, or otherwise not in accordance with law.

of time is required to satisfy the requirements of the United States Constitution." Section 318(g)(1). The statute allows the court authority to set special procedures to govern these proceedings and to assign such cases to special masters. *Id.*

4. Relationship to other laws.

Subsection (b)(6)(A) states that the spotted owl habitat guidelines adopted in subsections (b)(3) and (b)(5) suffice to meet the requirements of the laws at issue in respondents' pending cases.

Section 318(b)(6)(A) first declares that Congress is not "passing on the legal and factual adequacy of the [agency decisions at issue in the pending *Seattle Audubon Society* and *Portland Audubon Society* litigation]." Congress next specifically:

> . . . determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls ***is adequate consideration for the purpose of meeting the statutory requirements that are the basis for*** [the pending *Seattle Audubon Society* and *Portland Audubon Society* cases].

Section 318(b)(6)(A) (emphasis supplied).

Simply put, Congress desired to not determine the "legal adequacy" of the ***existing agency programs*** challenged in the pending litigation. It ***did*** desire, however, to determine the legal adequacy of the ***new spotted owl habitat guidelines*** adopted in subsections (b)(3) and (b)(5). Those guidelines were deemed to be consistent with other environmental laws and standards and "not . . . subject to judicial review . . . ." Section 318(b)(6)(A).

This intent is reflected in the legislative history of the provision which was adopted in the House-Senate Conference on the FY 1990 Interior Appropriations Act. The Conference Report notes:

> Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief. . . . Subsection (b)(6)(A) should be read in combination with subsection (g) which establishes expedited procedures for challenging timber sales in court. Together, these two subsections preserve the opportunity for judicial

> review of individual timber sales on a single-sale basis.

H.R. Conf. Rep. No. 264, *supra*, at 88-89.

In sum, section 318 replaced the existing Forest Service and BLM spotted owl habitat protection programs (at issue in the pending litigation) with different, more expansive programs applicable only to 1990 timber sales. It precluded judicial review over the adequacy of these new programs and limited judicial review of the application of the programs to individual timber contract sales. Finally, section 318 mandated that the new habitat protection guidelines were consistent with the environmental laws at issue in the pending litigation.

D. Post-section 318 district court proceedings.

1. Seattle Audubon Society v. Robertson.

On the basis of section 318, petitioner Robertson requested the district court to vacate the preliminary injunction still restraining 163 planned timber sales in Oregon and Washington. Respondents contended that section 318(b)(6)(A) was unconstitutional because Congress dictated the outcome in the pending cases and improperly barred judicial review of the spotted owl habitat guidelines established by the law.

On November 6, 1989 Judge William L. Dwyer lifted the injunction, determining that section 318(b)(6)(A) was

constitutional.[15] While recognizing that the separation of powers doctrine may bar Congress from directing a particular decision in a pending case, Judge Dwyer found that:

> However, subsection (b)(6)(A) does not require a particular decision on the issues of this case. Instead, it provides that for fiscal year 1990 the new standards adopted by Congress in subsections (b)(3) and (b)(5) will apply, and will be adequate for that year. In other words, Congress has adopted the Forest Service's proposed guidelines, challenged by both sets of plaintiffs in these cases, as statutory law for a period of one year. Congress clearly has the power to do this. . . .
>
> Just as Congress may create a geographic exception to the environmental laws, it may also create a temporal exception. It has done that here. Subsections (b)(3) and (b)(5), adopting the standards which subsection (b)(6)(A) deems adequate, apply only to that year . . . .

Pet. Writ of Cert., 24a.

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[15] That order is set out in Appendix D to the Petition for a Writ of Certiorari, 29a-34a. The Memorandum Decision on the constitutional claim issued on November 14, 1989 and is attached to the Petition for a Writ of Certiorari as Appendix C, 20a-28a.

Judge Dwyer retained jurisdiction of the cases because they were only partially mooted by the enactment of section 318. He ruled:

> The final question is whether the court should dismiss these cases or retain jurisdiction. Congress . . . has plainly stated that it did not mean to decide these cases, or to suggest what their final outcome should be. . . . Section 318 alters the rules of the controversy for the next year, but it does not end the controversy. . . . The texts of the statutes and the conference report show that Congress expected these cases to go forward.
>
> Whether or not the ROD is amended as a result of the process mandated by section 318, its legality under the environmental laws will still have to be decided. In the meantime, section 318 permits judicial review of proposed timber sales in the affected areas on an expedited basis. § 318(g). Given the short timetable mandated by Congress, it is important that the parties be able to proceed by motion in these cases rather than having to start a new lawsuit.
>
> For these reasons the cases will not be dismissed and the court will retain jurisdiction. . . .

Pet. Writ of Cert., 27a-28a.

2. *Portland Audubon Society v. Lujan.*

The same issues were involved in the Portland litigation. On December 21, 1989, dge Helen Frye dismissed the case as moot. Her decision is reproduced in Appendix E to the Petition for a Writ of Certiorari, 35a-42a. On the issue of the constitutionality of section 318(b)(6)(A), the court adopted "the reasoning and result of the United States District Court for the Western District of Washington in *Seattle Audubon Society v. Robertson*, ..." Pet. Writ of Cert., 37a-38a.

E. The decision of the court of appeals.

Respondents appealed the decisions of both district courts and the cases were consolidated on appeal. The court of appeals reversed, holding that the first sentence of section 318(b)(6)(A) was an improper limitation of judicial power by Congress. *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990). The court relied upon *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), to conclude that:

> [T]he critical distinction, for purposes of deciding the limits to Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without

> repealing or amending the law underlying the litigation, which is not permissible.

Seattle Audubon Soc'y, 914 F.2d at 1315.

The court reasoned that section 318 could have only one of these two effects:

> The issue before us, then, is whether section 318 is a permissible modification of the law underlying the two cases before us, as the district courts held, or an impermissible directive from Congress to the courts to decide the cases in a particular way.

Id. at 1316.

Framing the issue in this fashion, the court then reasoned that if section 318 did not expressly modify the laws forming the bases for respondents' claims, then, *a fortiori*, it must be an impermissible directive to the courts to decide the cases in a particular way:

> Section 318 does not, by its plain language, repeal or amend the environmental laws underlying this litigation, even though some subsections add additional requirements. The clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is re-

> quired under the environmental statutes involved in these cases. Thus, if the Secretary does follow subsections (b)(3) and (b)(5) by observing their limitations on owl habitat, then the Secretary will be deemed in fact to have met as well the requirements of several environmental statutes.
>
> In this way Congress, through section 318, seeks to perform functions reserved to the courts by Article III of the Constitution.

Id. at 1316 (footnote omitted).

The court found further support for its construction of section 318 as directed fact-finding, instead of a "temporary repeal of the environmental laws at issue in the underlying litigation," because it was adopted as part of an appropriations measure. Relying upon *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the court determined that implied substantive changes to laws cannot be enacted as part of an appropriations measure, thus "precluding a saving interpretation of subsection (b)(6)(A)." *Seattle Audubon Soc'y, supra*, at 1317.[16]

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[16] As a result of the court of appeals decision holding section 318(b)(6)(A) unconstitutional, litigation continues on the lawfulness of 1990 timber sales. On December 18, 1990, the district court for the Western District of Washington enjoined the award of 12 timber sales which the Forest Service had prepared, advertised and competitively auctioned in September, 1990 under the authority of Section 318. On May 24, 1991, four other sales were enjoined. The sixteen sales collectively contain over 97,327,000 board feet of timber.

Finally, the court confessed that its interpretation of section 318 was at odds with its legislative history:

> Although the legislative history of section 318 disguises the act as changing legal standards, the statutory language itself does not do so. The first sentence of subsection (b)(6)(A) violates the separation of powers doctrine.

Id. at 1317.

SUMMARY OF ARGUMENT

A. The cases were mooted because section 318 required different agency conduct than the conduct challenged in the pending cases.

Congress can constitutionally affect the outcome of litigation in more ways than by changing the law underlying the case or withdrawing the jurisdiction of the court to consider the case. Where the litigation is about prospective conduct of an agency, Congress can mandate different conduct. If Congress does this, judicial inquiry into the lawfulness of the previously planned behavior is no longer justiciable. In these cases, the prospective agency conduct at issue was legitimized or changed by various parts of section 318. The cases were mooted to the extent conduct mandated by these provisions replaces the agency conduct in question.

B. The cases were mooted because section 318 adopted an exclusive and different remedy to contest the agency conduct at issue.

Section 318(g) provides the exclusive remedy for contesting individual 1990 timber sales from the Oregon and Washington federal forests containing northern spotted owls. Section 318(g) moots respondents' premature, collective claims regarding these sales.

C. The cases were mooted because section 318 made the laws underlying respondents' claims inapplicable to the agency conduct at issue.

The court of appeals misconstrued section 318(b)(6)(A). The clear intent of the provision is to categorize the ***legal*** relationship of the mandated spotted owl habitat guidelines to the environmental laws otherwise applicable. The reading of section 318(b)(6)(A) given by the court of appeals is at odds with its text and legislative history.

D. Section 318(b)(6)(A) does not violate separation of powers principles drawn from United States v. Klein.

Section 318(b)(6)(A) makes no factual judgment. The subsection does not mandate particular judicial fact-finding; nor does it compel any particular judicial judgment on the merits of the cases below. To the contrary, it expressly disclaims any such judgment. The application of section 318(b)(6)(A) to the cases *sub judice* is consistent with the teaching of *United States v. Klein*, *supra*.

ARGUMENT

A. The cases were mooted because section 318 required different agency conduct than the conduct challenged in the pending cases.

1. Introduction.

Pending litigation can be affected by a wide range of congressional enactments. But respondents and the court of appeals allow Congress a choice between only *two* legislative options: an express general repeal of the statutes providing the bases for relief in the litigation; or, withdrawal of the jurisdiction of the courts to issue judgment in the case. But the choices available to Congress are certainly greater in number than these.

Congress has power to act in at least three other ways. First, it could adopt statutes on the litigation process that may affect the justiciability of a cause or its manner of adjudication. For example, legislation can narrow standing or make absent parties indispensable to the adjudication. Congress may also condition or limit the remedies available to a class of litigants. Applying this type of legislation to a pending case may markedly affect whether the requested relief is obtained.

Second, Congress can limit the applicability of general statutes to particular types of claims. Separate legislation may ordain particular policy, direct events or legitimize conduct notwithstanding otherwise applicable general law. Pending claims, brought within a newly-adopted statutory exception to the general law, may no longer be justiciable.

Finally, when litigation involves threatened prospective conduct of a government agency, Congress can compel different behavior by the agency. In so doing, claims about agency conduct no longer imminent are no longer justiciable.

The operation of section 318 produces all three of these effects. It changes the factual and legal context of the cases so that a justiciable question is no longer before the court with respect to the 1990 timber sales program. It ***moots*** portions of the relief requested by respondents, rather than directing the nature of this relief.

2 ***Mandated changes to agency conduct.***

The complaint in *Seattle Audubon Soc'y v. Robertson* sought injunctive and declaratory relief that operation of parts of the December 8, 1988 amended Regional Guide were inconsistent with three federal statutes. The particular agency conduct that was questioned involved:

(a) The decision to allow ***any*** timber harvesting of old-growth forests in parcel sizes of greater than 40 acres. Respondents contended all such habitat must be preserved for the northern spotted owl by operation of the cited federal statutes.

(b) The decision to require only 1,000 to 3,000 acres of preserved habitat around or near each spotted owl nesting site. Respondents believed larger areas were required.

(c) The decision to allow dispersion of these habitats. Respondents asserted that the preservation of large

> blocks of old growth forest, containing several SOHAs, was necessary.

Respondents prayed for a declaration that the planned conduct violated the NFMA, NEPA and the MBTA and for the court to:

> Order the Forest Service to comply with the requirements of NEPA, the NFMA and the MBTA, and until defendants do so, issue, as necessary, temporary restraining orders, preliminary and permanent injunctions restraining defendants from offering or awarding any contract for the sale and logging of timber from [listing of thirteen national forests] that will log more than forty (40) acres of suitable nesting or foraging habitat for northern spotted owls.

SAS Ex. Rec. 1, p. 21.

Various parts of section 318 compelled ***different*** conduct by the Forest Service during the 1990 fiscal year than intended under the amended Regional Guide. As noted earlier, the legislation adopted a temporary spotted owl habitat protection program which:

(a) Compelled substantial timber harvesting from forests "known to contain northern spotted owls . . . ." Section 318(a)(1).

(b) Required measures to minimize fragmentation of large stands of old-growth timber. Sections 318(b)(1) and 318(b)(2).

(c) Substantially increased SOHA size from the area mandated by the amended Regional Guide. Section 318(b)(3). As a result, over 300,000 additional acres were added to protected spotted owl habitat.

(d) Required limited protection of areas adjacent to SOHAs. Section 318(b)(4).

Thus, the statute substituted a different program for 1990 than the program countenanced under the amended Regional Guide.[17]

A similar dynamic occurred with respect to the *Portland Audubon Soc'y v. Lujan* litigation. There also, spotted owl protection decisions by the BLM were challenged as violating the same or similar federal laws. Declaratory and injunctive relief was sought, including an injunction on the offering of timber sales in old-growth forests. Section 318 compels the harvesting of timber from these areas and mandates the preservation of an additional 12 spotted owl habitat areas above the 110 areas reserved under the agency's adopted programs.

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[17] The Conference Report on the legislation notes that, "The managers have chosen to substitute adjusted interim standards for SOHAs for national forests in lieu of the spotted owl management Record of Decision (ROD) published in December, 1988." H.R. Conf. Rep. No. 264, *supra*, at 88.

The compelling of these substituted agency programs moots respondents' claims questioning the adequacy of earlier-planned programs for the same time period. Whether these substituted programs were lawful was not placed at issue in the complaints filed below. Any declaration or injunction about a different 1990 spotted owl protection program than required by section 318 would be pointless. Such relief would only be advisory. Article III to the Constitution bars the obtaining of purely advisory relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).[18]

This effect of section 318 does not depend upon the construction or constitutionality of section 318(b)(6)(A). Instead, it arises from those portions of the statute which define and mandate a temporary 1990 spotted owl protection program.

Finally, this effect of section 318 is limited. Section 318 does not moot legal issues about the adequacy of agency programs during the period beyond 1990.

For this reason, the court of appeals erred in reversing the district courts' dismissal of respondents' claims concerning the 1990 timber sales program as moot.

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[18] For cases where legislatively-mandated changes to agency programs were held to moot pending litigation about earlier-planned conduct *see Defenders of Wildlife v. Endangered Species Scientific Auth.*, 725 F.2d 726 (D.C. Cir. 1984); *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978).

B. The cases were mooted because section 318 adopted an exclusive and different remedy to contest the agency conduct at issue.

The second way that Congress mooted the claims in the pending cases through section 318 is by limiting the remedies available to contest the legal adequacy of the 1990 spotted owl protection program and its implementation through timber sales. To the extent that respondents challenged this 1990 program in the cases below, their claims are barred. To the extent their challenge was aimed at the implementation of this program, their claims were untimely and not in the form required by the statute.

The adopted 1990 spotted owl protection program is largely contained in subsections (b)(3) and (b)(5) of section 318. The last sentence of section 318(b)(6)(A) provides that:

> The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States.

This restriction precludes judicial inquiry into the legal adequacy or wisdom of the particular spotted owl habitat programs mandated by the statute.[19] It eliminates the

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[19] No party to this litigation has suggested that Congress lacks the power to limit judicial review in this manner. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986) ("Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency (continued...)

judicial review remedy that otherwise might exist under 5 U.S.C. §§ 702 and 706(2)(A).[20] To the extent respondents' claims in the proceedings below seek such a remedy, they are barred under section 318(b)(6)(A).[21]

The ***only*** remedy provided by section 318 is set out in subsection (g). Subsection (g) allows challenge to ***individual***

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[19] (...continued)
action. The presumption of judicial review, is, after all, a presumption . . . ."). Here, Congress' power to deprive the court of jurisdiction is strengthened by the doctrine of sovereign immunity since these actions are against the United States. Under this doctrine, "[t]he United States, a sovereign, is immune from suits save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941). Where Congress has consented to suit against the United States, "Congress retains power to withdraw the consent at any time." *Lynch v. United States*, 292 U.S. 571, 581 (1934). For this reason, "statutes either denying or withdrawing judicial remedies against the United States or with respect to claims against it are constitutional." *Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985).

[20] The sole basis for obtaining judicial review asserted in the complaints filed below is under these provisions of the Administrative Procedures Act. *See*, SAS Ex. Rec. 1, pp. 19-20; PAS Ex. Rec. 15-16. 5 U.S.C. § 702 gives a person adversely affected or aggrieved by "agency action" the right to seek judicial review. 5 U.S.C. § 705 specifies the relief available pending review.

[21] This provision of the statute was ignored by the court of appeals. "We express no opinion on the validity of the second and final sentence of subsection (b)(6)(A)." *Seattle Audubon Soc'y v. Robertson*, *supra*, at 1317, n.4 (1990).

timber sales offered in 1990. Such a claim is limited to the issues of whether such a sale is consistent with the mandated spotted owl program or is otherwise in accordance with laws regulating the timber sale contract process. The statutory subsection requires that complaints about individual timber sales "be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale." Section 318(g)(1).

Thus, to the extent that respondents' complaints can fairly be read to include a challenge to the award of 1990 timber sales contracts, the claims are defective for two reasons. First, they seek no review over ***individual*** timber sales. Instead, they question a ***collective*** program. Second, the complaints were not filed within fifteen days after initial advertisement of these contracts.

There is little question that Congress can substitute, repeal, or enact remedies in a way that moots pending litigation concerning statutory duties or rights.[22] *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975) (shareholder derivative suit mooted by intervening legislation providing for administrative remedy).

Here, section 318 relegates certain 1990 timber sale contract disputes to the exclusive judicial process described in subsection (g). Because portions of respondents' claims

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[22] This case involves no ***constitutional*** right or duty of any party to the litigation. The power of Congress to limit the remedial powers of the judiciary for constitutional claims may be subject to a different analysis than Congress' power to limit remedies concerning rights or duties of its own making.

seek greater remedies than provided in this law, and because they are not brought in the fashion mandated by the statute, respondents' claims for relief concerning these sales are moot.

For this second reason, the court of appeals erred in reversing the district courts' dismissal of these claims as moot.

C. The cases were mooted because section 318 made the laws underlying respondents' claims inapplicable to the agency conduct at issue.

The final aspect of mootness, and the only one adjudicated by the court of appeals, concerns whether section 318 excepted the adopted spotted owl protection program from the provisions of the environmental and planning statutes underlying respondents' claims in the complaints below. Congress' intent to create such an exception is clear from the text of the statute and its legislative history. Congress is not disabled from promulgating such an exception by choosing to place it within an appropriations measure.

There are three questions relevant to the analysis of the efficacy of section 318(b)(6)(A):

(1) Does Congress have the power to create exceptions to previously adopted general laws?

(2) Did Congress intend, in adopting section 318(b)(6)(A), to create exceptions to the dictates of the statutes underlying respondents' claims in the cases below?

(3) Should that intent not be given effect because of its form (a legislative determination of deemed compliance) or its placement in an appropriation measure?

All parties agree on the answer to the first question. It goes without question that Congress can amend or repeal previously adopted law.[23] It can do this either by directly amending or repealing the law or by making a subsequent law the exclusive policy in the subject area (implied repeal). Congress' power to do this is limited only by constitutional constraints on the manner of enacting legislation (constitutional requirements of bicameralism and presentment) or the content of legislation (*e.g.*, equal protection, bill of attainder).

There can be no dispute on the answer to the second question; the differences between the parties really lie in the third part of the analysis.

Section 318(b)(6)(A) provides in relevant part that:

> (6)(A) Without passing on the legal and factual adequacy of the Final Supple-

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[23] For cases holding that an amendment to legislation moots claims about the operation of the unamended law, *see*, *Lewis v. Continental Bank Corp.*, ___ U.S. ___, 110 S. Ct. 1249 (1990); *United States Dep't of Treasury v. Galioto*, 477 U.S. 556 (1986); *Hall v. Beals*, 396 U.S. 45 (1969); *Hines v. Davidowitz*, 312 U.S. 52 (1941). This mooting effect is even more pronounced when the litigation seeks only declaratory or injunctive relief, as is the case here. *See Bunker Ltd. Partnership v. United States*, 820 F.2d 308, 311 (9th Cir. 1987).

> ment to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls ***is adequate consideration for the purpose of meeting the statutory requirements that are the basis for*** [the pending *Seattle Audubon Society* and *Portland Audubon Society* cases].

Section 318(b)(6)(A) (emphasis supplied).

Congress' intent is plain. It is very clear that Congress intended to except the enacted spotted owl habitat program and its implementation from the operation of the NEPA, the MBTA, the NFMA, the OCLA, and the Federal Land Policy and Management Act, *i.e.*, the "statutory requirements that are the basis for" the cited litigation. What other meaning can there be to the language "adequate consideration for the purpose of meeting the . . . requirements" of these statutes?

This intent is displayed in the legislative history of the statute. The Conference Report, after declaring the intent to establish the "legal adequacy of . . . the SOHA framework established" in subsections (b)(3) and (b)(5), states:

> Section (b)(6)(A) does not pass on the legal sufficiency of the existing Forest Service ROD or the BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsections (b)(3) and (b)(5) establish interim SOHA standards for fiscal year 1990 which protect more habitat than currently protected by the Forest Service and BLM, subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards as a reason for injunctive relief.

H.R. Conf. Rep. No. 264, *supra*, at 89.

This legislation was enacted to respond to the consequences of litigation, to ameliorate the effects of injunctions stopping the supply of timber in the Pacific Northwest. Congress plainly intended to limit litigation over the compromise program it adopted. Without excepting the temporary program from argument over the applicability of general environmental and planning laws, the program would never be implemented.

The intent of Congress is plain from the text, the legislative history and the context of this legislation.

The final question is whether this congressional intent should not be given effect because of its form or because it was adopted as part of an appropriations measure. The latter issue merits quick disposition.

Relying upon *Tennessee Valley Auth. v. Hill*, *supra*, the court of appeals found that Congress could not enact an implied partial repeal of environmental statutes in an appropriations measure. *Seattle Audubon Soc'y v. Robertson*, *supra*, at 1317. This purported disability was critical in the court's determination that section 318(b)(6)(A) had no such effect.

What *Hill* and other precedent establish, however, is that while repeals by implication are ***disfavored*** in appropriations measures, they clearly are not ***prohibited***. The issue is one of congressional intent. An allowance or withdrawal of an appropriation is not sufficient ***by itself*** to repeal general substantive law.

Thus, the rule is stated in *United States v. Will*, 449 U.S. 200, 222 (1980):

> Nevertheless, when Congress desires to suspend or repeal a statute in force, "[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriations bill, or otherwise." *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940). "The whole question depends upon the intention of Congress as expressed in

> the statutes." *United States v. Mitchell*, 109 U.S. 146, 150, 3 S.Ct. 151, 153, 27 L.Ed. 887 (1883).

The placement of section 318 in an appropriations measure is no bar to giving effect to the obvious congressional intent here.

Whether the form of the congressional action here was proper raises the first of two separation of powers concerns. Whether section 318(b)(6)(A) offends separation of powers principles depends upon: (1) whether Congress was exercising a power that is constitutionally committed to the judiciary; and, (2) whether the exercise of this power by Congress prevents the judiciary from exercising its constitutional functions or duties. The first concern is one about the ***type*** of action taken; the second concern goes to the action's ***effect***.

These are related but different concepts. An example of the first concern is *Bowsher v. Synar*, 478 U.S. 714 (1986). There, this Court held a statute unconstitutional because it improperly gave an agent of Congress executive functions to perform. An example of the second concern is *United States v. Klein*, *supra*, where the Court held that Congress acted improperly in prescribing an unconstitutional rule of decision in a pending case under threat of loss of judicial jurisdiction. As more fully discussed below, Congress directed no rule of decision in pending cases in adopting section 318(b)(6)(A). Instead, it is the first concern that is more relevant here.

Congress acted in a policy-making legislative manner in adopting the first sentence of section 318(b)(6)(A). Respondents contend that the form of the enactment, a determination that the spotted owl policies are consistent with the policies dictated by other statutes, is judicial in nature. For the reasons stated below, respondents are incorrect.

Whatever issues may exist, however, about the ***form*** of the enactment, its ***substance*** -- the creation of an exception to the operation of general environmental and planning laws -- is well within the province of the Legislative Branch. As this Court aptly observed in *Crowell v. Benson*, 285 U.S. 22, 53-54 (1932):

> In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority . . . regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.

Here, the form of the enactment is of little constitutional significance. This Court can and should avoid further separation of powers analysis by reading section 318(b)(6)(A) to mean what it does, legislating a programmatic exception to statutes previously enacted.[24]

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[24] *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (court should adopt construction of statute by which issue of constitutionality can be avoided).

If the form of the provision is significant, however, it does not offend constitutional principles about separation of powers. Congress can legislate conclusions about the meaning and effect of statutes. There is no constitutional text or principle that assigns this task exclusively to the judiciary. When Congress draws such conclusions, it only edits the work it previously has done. It does not adjudicate.

This is particularly true when, as here, Congress determines the effect of statutes which govern policymaking by administrative agencies, as opposed to statutes which create individual rights or duties. The statutes in question, the NEPA, the NFMA, the OCLA, and the Federal Land Policy and Management Act, control administrative agencies and executive branch officers and set standards for the creation of administrative policy. Congress acts as a policymaker and in an Article I manner when it preempts administrative policymaking, issues its own policies and determines that statutes guiding the formation of administrative agency policy are satisfied.[25]

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[25] The section 318(b)(6)(A) determination that these environmental and planning statutes are satisfied may reflect nothing more than the conclusion that these statutes do not apply ***to Congress***, to programs mandated by specific congressional enactments. The statutes in question apply to executive branch officers and administrative agencies. ***They do not apply to Congress***. *See* 42 U.S.C. § 4332(2) (application of NEPA to "all agencies of the federal government"); 43 U.S.C. § 1712 (land use planning of Secretaries of Agriculture and Interior regulated by Federal Land Policy and Management Act); 16 U.S.C. § 1604 (Secretary of Agriculture limited by standards of National Forest Management Act); 43 U.S.C. § 1181a

(continued...)

Any constitutional limitations on statutes which draw conclusions come, not from Article I, but from other parts of the Constitution. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (regulation creating irrebuttable presumption found to violate Due Process Clause). No such constitutional infirmity is assigned here.

In sum, Congress is constitutionally empowered to amend, repeal, or create exceptions to legislation. In the enactment of section 318(b)(6)(A), Congress exercised this power to except the mandated spotted owl protection program from the operation of particular environmental and planning laws. Congress exercised this power in a legislative manner, consistent with its authority under Article I of the Constitution.

Because section 318(b)(6)(A) excepted the 1990 spotted owl habitat protection program from the laws which respondents allege to be violated, respondents' claims which seek redress for these actions were mooted. For this third reason, the court of appeals erred in reversing the district courts' dismissal of those claims as moot.

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25 (...continued)
(Department of Interior actions limited by OCLA), 16 U.S.C. § 707 (coverage of MBTA affects only "persons" and not governmental agencies or Congress). In many cases these statutes state that they do not control conduct authorized by specific law. *See* 42 U.S.C. § 4334 (NEPA not intended to affect agency compliance with specific environmental criteria or standards); 43 U.S.C. § 1701(b) (OCLA policies not in derogation of "the purposes for which public lands are administered under other provisions of law.")

D. Section 318(b)(6)(A) does not violate separation of powers principles drawn from United States v. Klein.

The second separation of powers concern is whether the implementation of section 318(b)(6)(A) prevents the judiciary from exercising its constitutional functions. Respondents claim, and the court of appeals held, that the statutory subsection violates this separation of powers principle by directing the outcome in the cases below.

Section 318(b)(6)(A) does no such thing. As argued above, it ***moots*** the 1990 claims in the cases below by substituting different agency action, limiting the scope of available remedies and modifying the applicable standards. But it does not ***direct judgment*** by the district courts on whether the 1987 and 1988 agency programs in question violated the environmental and planning laws raised in respondents' complaints.

Only when Congress leaves the applicable substantive and remedial law in place, allows the courts to retain jurisdiction, requires no different conduct by the defendant, and ***then*** directs the outcome of litigation does it invade the constitutionally assigned function of the courts. That was the vice of the legislative action in *United States v. Klein*, *supra*.

In *Klein*, Congress enacted a law requiring a court to make a conclusive factual finding on the effect of a presidential pardon, that the issuance of a pardon for acts of treason during the Civil War proved the commission of the acts of treason described in the pardon. More importantly, the legislation required the court of claims and this Court to deny any pending claims based on a presidential pardon

for want of jurisdiction. The legislation did not require the courts to refrain from acting on a case, but to act in a particular way -- to dismiss the case ***on its merits***.

Klein is different from the cases at bar in three significant ways. First, section 318(b)(6)(A) does not direct a decision ***on the merits*** of the claims asserted below. It expressly states that it has no effect on "the legal and factual adequacy" of the agency decisions challenged in the pending cases. The statute provides that:

> (6)(A) Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide--Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 8, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs . . . .

Section 318(b)(6)(A).

This intent is reflected in the statute's legislative history. As noted in the Conference Report:

> The legal adequacy of and prohibition against judicial review of the SOHA framework . . . should not be construed to moot

> future action after fiscal year 1990 in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases against the current Forest Service owl management ROD or any cases which may be filed against a revised ROD.
>
> . . . .
>
> . . . The legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case against current BLM owl management activities or any cases which may be filed against future BLM management decisions.
>
> . . . .
>
> Nothing in [section 318(b)(6)(A)] is intended to prejudge . . . any final decisions that may be reached by a Federal court in the *Seattle Audubon/Washington Contract Loggers Assoc. v. Robertson* cases and the *Portland Audubon v. Lujan* case . . . .

H.R. Conf. Rep. No. 264, *supra* at 88-89.

Thus, section 318(b)(6)(A) leaves intact the non-mooted claims in the litigation and directs no particular result in the adjudication of those claims. In the words of Judge Dwyer,

"Section 318 alters the rules of the controversy for next year, but it does not end the controversy." Memorandum Decision, Pet. Writ of Cert. 24a.

The second distinction is that section 318(b)(6)(A) involves no constitutional classification. In *Klein*, the legislative presumption determined the effect of a presidential pardon and thus infringed the constitutional power of the Executive. The power of Congress to determine the effect of its ***own*** actions is different from its power to determine the effect of actions of ***another*** branch of government.

Finally, Congress, in adopting section 318(b)(6)(A), took action pursuant to a specific enumerated power given to it by the Constitution. Article IV, section 3, clause 2 of the Constitution empowers Congress,

> [T]o dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States . . . .

In *United States v. Sioux Nation of Indians*, *supra*, this Court recognized that Congress' power to affect issues in pending or future litigation may be greater when it is acting pursuant to a specific enumerated power in the Constitution. There, the congressional power to pay debts granted in Article I, section 8, clause 1 was a significant factor in this Court's approval of legislation allowing re-litigation of a cause previously decided by the courts.

Thus, section 318(b)(6)(A) does not direct a decision by any court. It offends no principle of separation of powers.

The court of appeals erred in holding that the subsection was unconstitutional for this reason.

CONCLUSION

This Court has recently stated that, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, . . . it should do so for only the most compelling constitutional reasons." *Mistretta v. United States*, ___ U.S. ___, 109 S. Ct. 647, 661 (1989). There is no constitutional reason, much less a compelling one, to rule that any part of section 318 is unlawful.

The court of appeals erred in reversing the dismissal of respondents' 1990 timber sale claims as moot. These claims were mooted by section 318 in three different ways: by the change to the agency conduct at issue; by the limitations placed on the remedies available to contest the agency action; and, by the change in the applicability of the laws underlying respondents' claims. The legislation offended no principle of separation of powers either in the manner of its enactment or in its effect on pending cases.

The decision of the court of appeals in *Seattle Audubon Soc'y v. Robertson*, *supra*, should be reversed and remanded to the court of appeals for a determination of the second

issue on appeal raised by respondents in the *Portland Audubon Soc'y v. Lujan* case.

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Respectfully submitted,

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